11

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

In the Matter of)
ccAdvertising) NORTH DAKOTA'S COMMENT) ON FREEEATS.COM, INC.'S) PETITION FOR EXPEDITED
Petition for Expedited Declaratory Ruling) DECLARATORY RULING
) CG Docket No. 02-278) DA 04-3187)
) CPAT 040345.001

Todd A. Sattler, NDBN 5718
James Patrick Thomas, NDBN 6014
Assistant Attorneys General
Consumer Protection
& Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
Telephone (701) 328-5570
Facsimile (701) 328-5568

Attorneys for State of North Dakota

SUMMARY OF ARGUMENT

North Dakota contends the FreeEats.com, Inc. Petition for Expedited Declaratory Ruling is not properly before the FCC because the doctrine of sovereign immunity and the 11th Amendment to the United States Constitution bar a private party from forcing a sovereign State into an adjudicative proceeding without the consent of the sovereign.

In the alternative, without waiving the foregoing, North Dakota argues its statute governing prerecorded messages and automatic dialing devices, N.D.C.C. § 51-28-02, is not preempted by the regulations promulgated by the FCC under the Telephone Consumer Protection Act. Federal law is presumed not to preempt State law unless Congress has clearly expressed its intention to do so. The TCPA contains no such expression of intention to preempt, and, in fact, the plain language of the statute indicates Congress instead intended for the States to continue to exercise concurrent jurisdiction over consumer protection and privacy regulation of telecommunications activities.

TABLE OF CONTENTS

INTRO	ODUC	TION	1		
BACK	(GROL	JND	3		
ARGL	JMENT	<u>.</u>	4		
l.		TES HAVE A COMPELLING INTEREST IN CONSUMER PROTECTION PRIVACY LEGISLATION6			
	A.	States' Police Power Extends to Consumer Protection and Privacy6			
	B.	The FCC Recognizes Consumer Protection and Privacy Interests to Support Telemarketing Regulation			
	C.	The States Have Long Regulated Telemarketing Practices Implicating State Interests			
II.	. THE TCPA DOES NOT PREEMPT NDCC § 51-28-02				
	A.	The Supremacy Clause of the United States Constitution12			
	B.	There Are Strong Presumptions Against Preemption13			
	C.	Determination of Congressional Intent15			
		1.	The TCPA does not expressly preempt State law16		
		2.	The plain language of the savings clause controls17		
		3.	Even if the savings clause is ambiguous, there is no preemption of NDCC § 51-28-0220		
		4.	The Eighth Circuit Court of Appeals, in <u>Van Bergen</u> , ruled the TCPA does not preempt State law governing ADADs24		
			CPA Does Not Result In Field Preemption25		
			CPA Does Not Result in Conflict Preemption29		
CON	CLUSIC	ON	32		

The State of North Dakota by Attorney General Wayne Stenehjem ("North Dakota") contends the doctrine of sovereign immunity under the Eleventh Amendment to the United States Constitution bars the Petition for Expedited Declaratory Ruling dated September 13, 2004 ("Petition") directed to the Federal Communications Commission ("FCC") by FreeEats.com, Inc. doing business as The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.info, ElectionResearch.com, FECads.com, FECResearch.com (collectively "FreeEats"). North Dakota expressly reserves its sovereign immunity argument - having simultaneously filed with the FCC a motion to dismiss - and without waiving the same, submits this comment in the alternative, in the event the FCC denies North Dakota's motion to dismiss. The FCC should first decide the motion and dismiss the Petition without consideration.

INTRODUCTION

It has been 13 years since Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). After multiple related rulemaking procedures, myriad comments, requests for reconsideration and the like, the FCC has not definitively said State law different than the TCPA is preempted by FCC regulations. Nonetheless, despite the fact that the FCC has repeatedly declined invitations and opportunities to make a sweeping pronouncement, FreeEats contends it is "clear" that Congress intended that result. If it is clear, however, why wasn't the issue resolved long ago? It is because the preemption argument advanced by FreeEats, at the invitation of the FCC, is clear in only one sense - clearly wrong - and the FCC recognizes its own jurisdictional limitations. The FCC previously acknowledged the issue was not clear, declaring "This provision [47 USC § 227(e)(1)] is ambiguous, however, as to whether

this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003)("TCPA Order"), ¶ 82. The lack of clarity also is illustrated by the fact that the FCC previously has sought comment and input from the public as to whether the TCPA preempts State law. See e.g. Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, 17474 (2002) at ¶¶ 48, 66. As will be discussed, infra, it is not public opinion or industry lobbyists which determine whether State law is preempted; preemption is a function of Congressional intent, nothing more. The construction of a statute is a question of law to be resolved by a court. Minnesota v. Heckler, 718 F.2d 852, 860 (8th Cir. 1983). Moreover, the existence of preemption is a question of law. National Bank of Commerce v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999).

If the FCC adopts the position advanced by FreeEats (and for all practical purposes the petitioners Express Consolidation, Inc. challenging Florida's telephone solicitation statute and American Teleservices Association, Inc. challenging New Jersey's consumer fraud act and related regulations) it will take the first step down a very slippery slope. Even though FreeEats purports to attack only North Dakota's "automatic dialing-announcing device" ("ADAD") statute on the grounds of field and conflict preemption, what is to prevent telemarketers from highjacking an FCC preemption ruling to usurp States' ability to regulate any aspect of consumer protection with a telecommunications component? Surely the ongoing interest in preemption by

the telemarketing industry presages a "today prerecorded messages; tomorrow the world" approach to avoiding State law enforcement. What is to prevent a federal preemption defense from barring a State from prosecuting any run-of-the-mill fraud case which happens to involve a telephone or barring enforcement of laws regarding telecommunications practices which have been enacted by some 44 States? Is that what Congress intended to accomplish with the TCPA and will the FCC, after tying the States' hands, step in and prosecute those cases with the same diligence and alacrity as the States?

BACKGROUND

In 2003 North Dakota's Legislature enacted a "Do Not Cail" law to protect North Dakotans from certain unwanted and intrusive telephone calls, namely autodialed prerecorded messages to telephone subscribers without their prior consent. Section 51-28-02 of the North Dakota Century Code says:

Use of prerecorded or synthesized voice messages. A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.¹

In discussing the TCPA, which has similar prohibitions, the FCC noted the public interest in regulating ADAD calls.

[&]quot;Automatic dialing-announcing device' ["ADAD"] means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." NDCC § 51-28-01(1).

24. The legislative history of the TCPA suggests that autodialer-generated calls are more intrusive to the privacy concerns of the called party than live solicitations. An autodialer can generate far more calls to residences than a telemarketer can manually. In addition, an autodialer is frequently used to send artificial or prerecorded messages, which the legislative history suggests are often a greater nuisance and invasion of privacy than calls placed by "live" persons.

17 FCC Rcd at 17474 (footnotes omitted).

Regardless, FreeEats would have the FCC find the North Dakota Legislature's actions were futile and, in fact, contrary to U.S. Congressional intent as expressed in the TCPA. FreeEats seeks a ruling that North Dakota's prerecorded message statute is preempted - not by the express act of the U.S. Congress, but rather based on arguably overreaching pronouncements of the FCC. The FCC may be entitled to deference on substantive issues within its area of substantive expertise, however, the FCC may not determine whether its jurisdiction reaches so far as to extinguish the rights of a sovereign State to enact legislation for the benefit of its citizens. The question before the FCC is whether Congress, invoking the Supremacy Clause of the U.S. Constitution and expressing its will through federal legislation, intended to prevent States from exercising their police powers to protect consumers.

ARGUMENT

Our decision today is the most sweeping consumer protection measure ever adopted by the FCC. No longer will consumers be forced to endure unwanted telephone calls and faxes. Under the Telephone Consumer Protection Act (TCPA) and our revised rules, consumers are empowered to choose.

The TCPA is about tools. It gives consumers the tools they need to build a high and strong fence around their homes to protect them from unsolicited telephone calls and faxes. It also allows other consumers to have a lower fence or no fence at all, if they wish to take advantage of these commercial messages. Our decision makes the American consumer's toolbox more complete by creating a national do not call list and strengthening and modifying our other longstanding protections under the TCPA. Our goal: to maximize consumers' ability to control

the messages they receive on their personal phones and faxes.

<u>Separate Statement of Chairman Michael K. Powell</u>, TCPA Order at 14174. FreeEats' interpretation of the TCPA destroys one of the most effective tools available to the American consumer - the ability of States to enact legislation to defend their own citizens.²

In 1992 the FCC determined that a national do-not-call list was too costly and burdensome; in 2002 the FTC began the process of establishing a national do-not-call list. DNC Implementation Act at 3-4. According to the FCC, the FTC telemarketing rules pertain only to interstate transmissions, yet do not preempt State law. TCPA Order, 18 FCC Rcd at ¶¶ 10, 24, 212. In approving funding for the do-not-call list, Congress directed the FCC to harmonize its regulations with the FTC's.

As the FCC undertakes the process of revising its do-not-call regulations, there is the potential for inconsistencies between the FTC and FCC do-not-call rules. To address this issue, H.R. 395 directs the FCC to complete its rulemaking within 180 days of enactment and further requires the FCC to consult and coordinate with the FTC to maximize consistency between the two regulations. However, because the FCC is bound by the TCPA, it is impossible for the FCC to adopt rules identical to the FTC's TSR.

DNC Implementation Act at 4. The FCC obviously gives great weight to this mandate: "In response to the widespread consumer dissatisfaction with telemarketing practices, Congress has recently affirmed its support of a national do-not-call registry in approving funding for the FTC's national database. In so doing, Congress has indicated that this Commission should adopt rules that "maximize consistency" with those of the FTC." TCPA Order at 14034-14035 (emphasis added). In implementing its regulations, the FCC purports to meet the Congressional goal.

Consistent with the instructions in the recently enacted Do Not Call Implementation Act, our order maximizes consistency and complements the FTC's recently amended rules. I look forward to working with the FTC, under the

² Stripping the States of their enforcement powers was not the objective of Congress in passing the TCPA and the Do-Not-Call Implementation Act, House Report No. 108-8 (February 11, 2003), 2003 U.S.C.C.A.N. 668 ("DNC Implementation Act"). Congress gave overlapping grants of federal jurisdiction over telecommunications issues to the FCC and the Federal Trade Commission ("FTC"). Pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 USC § 6101, et seq., the FTC enacted the Telemarketing Sales Rule,16 CFR § 310.1, et seq. (the "TSR").

I. STATES HAVE A COMPELLING INTEREST IN CONSUMER PROTECTION AND PRIVACY LEGISLATION

A. States' Police Power Extends to Consumer Protection and Privacy

Section 51-28-04 is at its core a consumer protection statute, and like the TCPA is designed to defend the privacy of consumers and prevent the burdensome and annoying consequences of the use of ADADs. Consumer protection and privacy issues have long been within the province of the States' police powers. The U.S. Supreme Court has found a substantial governmental interest in the prevention of abusive and coercive sales practices. Edenfield v. Fane, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed. 2d 543 (1993); Cedar Rapids Cellular Tele. v. Miller, 280 F.3d 874, 880 (8th Cir. 2002)(States have a long history of regulating against unfair business practices and protecting residents' rights).

Also, a State's interest in protecting the "well-being, tranquility, and privacy of the home" is a strong, subordinating interest that the government is entitled to protect.

Frisby v. Schultz, 487 U.S. 474, 484, 108 S.Ct. 2495, 101 L.Ed. 2d 420 (1988); see also

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)(quoting Metropolitan Life Ins. Co. v.

Massachusetts, 471 U.S. 724, 756 (1985))("[T]he States traditionally have had great

(cont.)

fine leadership of Chairman Muris, to harmonize our rules and move forward with nation-wide implementation of the federal Do-Not-Call Registry.

Separate Statement of Chairman Michael K. Powell, TCPA Order at 14174. In fact, each of the Separate Statements of Commissioners Powell, Abernathy, Copps and Adelstein discuss the effect of the TCPA Order having fulfilled Congress' directive to "maximize consistency" with the FTC rules, yet on the issue of preemption, the FCC is decidedly out of step with the FTC. TCPA Order at 14174-14178. The FTC does not preempt State law; but, the FCC has indicated that it "almost certainly" will.

latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"); Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 164-65, 122 S.Ct. 2080, 153 L.Ed. 2d 205 (2002)("residents' privacy" is among "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity"); Rowan v. United States Post Office, 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed. 2d 736 (1970)(upholding the right of a homeowner to restrict material mailed to the homeowner's residence, while emphasizing the traditional importance of individuals' privacy in the home); FCC v. Pacifica Foundation, 438 U.S. 726, 748, 98 S.Ct. 3026, 57 L.Ed. 2d 1073 (1978)("[I]n the privacy of the home ... the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); Hill v. Colorado, 530 U.S. 703, 716-17 (2000)(right to be left alone is a compelling government interest).

B. The FCC Recognizes Consumer Protection and Privacy Interests to Support Telemarketing Regulation

The FCC recognizes these same principles in the context of telecommunications regulation: "Here, the record supports that the government has a substantial interest in regulating telemarketing calls. ... Accordingly, we believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." TCPA Order at ¶ 66. The FCC goes on to address the unique problems resulting from the use of ADAD technology.

The record reveals that the practice of sending prerecorded messages to residential telephone lines is widespread. Consumers are frustrated by such messages, which often fill up the tapes of their answering machines, fail to identify adequately the company delivering the message, and provide no option for requesting that the company not call again. When consumers attempt to

place their numbers on a do-not-call list in response to a prerecorded message, they often reach busy signals, additional prerecorded messages, or are told that do-not-call requests are not processed at that number. Consumers also indicate that they have been told by telemarketers that "free" offers and informational messages are not subject to the prerecorded message prohibition, as they do not ask the called party to purchase any product or service.

TCPA Order at ¶ 137 (footnotes omitted).

Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls ... to be a nuisance and an invasion of privacy." It also found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Congress determined that such prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers. The record reveals that consumers feel powerless to stop prerecorded messages largely because they are often delivered to answering machines and because they do not always provide a means to request placement on a do-not-call list.

TCPA Order at ¶ 139 (footnotes omitted). The FCC did not heed the Congressional finding that the "only effective means of protecting telephone consumers from this nuisance and privacy invasion" was "[b]anning such automated or prerecorded telephone calls[.]" Banning such calls is, however, the route North Dakota chose in § 51-28-02.

C. The States Have Long Regulated Telemarketing Practices Implicating State Interests

The FCC admits "The states have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules. In fact, the TCPA specifically outlines a role for the states in this process." TCPA Order at ¶ 75 (footnote omitted).

Many state and consumer commenters note, however, that the TCPA contemplates a role for the states in regulating telemarketing and specifically

prohibits preemption of state law in certain instances. States and consumers note that state do-not-call regulations have been a successful initiative in protecting consumer privacy rights. In addition, several commenters note the importance of federal and state cooperation in enforcing the national do-not-call regulations. The record also indicates that states have historically enforced their own state statutes within, as well as across state lines. The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, and at least one federal court has found that the TCPA does not preempt state regulation of autodialers that are not in actual conflict with the TCPA.

TCPA Order at ¶ 78 (footnotes omitted).

The States have already addressed this issue in a unified voice, in response to the FCC's request for comment through the Notice of Proposed Rulemaking issued September 18, 2002, published in the Federal Register on October 8, 2002. "We cannot stress enough that the Commission should not attempt to usurp state authority and purport to strip states of the power to enforce laws that the people of the states, through their elected representatives, have determined were appropriate to protect the privacy of the people in their homes." Comments and Recommendations of the Attorneys General of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Guam, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota. Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, The Corporation Counsel of the District of Columbia, and The Hawaii Office of In the Matter of Rules and Regulations Implementing the Consumer Protection. Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No.

92-90, National Association of Attorneys General comment, December 9, 2002 ("2002 NAAG Comment") at p. 5. "The foremost concerns of the Attorneys General are to preserve the right of the states to enforce their own laws and to work cooperatively with federal authorities in protecting consumers. ... Of paramount importance to the Attorneys General is that the existing, or future, state do-not-call lists not be preempted or purportedly preempted." Id. at p. 8.

The Attorneys General's interest was not merely hypothetical:

Currently, at least thirty-three states [in 2004, approximately 44 States] have statutes that regulate autodialed calls and/or prerecorded messages. Attorneys General have utilized these statutes to bring enforcement actions against violators who were leaving unsolicited, prerecorded commercial messages. ... [T]he force and effect of state statutes can and will be felt by abusive telemarketers if the states are left unfettered in their efforts to curb this form of telemarketing. The Attorneys General encourage the Commission to adopt rules that will enhance their enforcement efforts against these unwanted intrusions. The Attorneys General further encourage the Commission to engage in cooperative enforcement efforts on these matters with the states, but urge the Commission to avoid any efforts to preempt or block state action in this area.

2002 NAAG Comment, at p. 33 (footnotes omitted).³ The FCC recognized this important State interest:

3

It is also clear that such independent state laws may affect interstate calls or telecommunication services and still not be preempted. See In Re Universal Service Fund Telephone Billing Practice Litigation, 247 F.Supp. 2d 1215, 1221, 1226 (D. Kan. 2002)(holding that the FCA did not completely preempt state fraud claims where companies misrepresented the amount of Universal Service Fund charges, which are based on interstate calls, that they would pass on to the government; some misrepresentations were allegedly made over the Internet and a 1-800 number); see also Minnesota v. WorldCom, Inc., 125 F.Supp. 2d 365, 372 (D. Minn. 2000)(permitting lawsuit by state attorneys general for state-law false advertising as applied to promotion of interstate long distance services because WorldCom has not identified any provision of the FCA demonstrating that Congress intended to regulate the advertisement of interstate long distance telephone services.); A.S.I. Worldwide Communications Corp. v. WorldCom, Inc.,

[The National Association of Attorneys General, or NAAG] contends that states have historically enforced telemarketing laws, including do-not-call rules, within, as well as across, state lines pursuant to "long-arm" statutes. According to NAAG, these state actions have been met with no successful challenges from telemarketers. We note that such "long-arm" statutes may be protected under section 227(f)(6) which provides that "nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state." Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court.

TCPA Order at ¶ 85 (emphasis added)(footnotes omitted).⁴ At that time, the FCC virtually conceded State law enforcement may proceed - unimpaired by preemption - under the TCPA.

II. THE TCPA DOES NOT PREEMPT NDCC § 51-28-02

Section 51-28-02 advances important privacy and consumer protection interests; however, FreeEats seeks to nullify State law and frustrate State objectives where they diverge from FCC regulations. FreeEats argues the TCPA preempts NDCC § 51-28-02

(cont.)

115 F.Supp. 2d 201, 207 (D.N.H. 2000)("I cannot reasonably infer that Congress manifested a clear intention to occupy the entire interstate telecommunications field to the exclusion of any state regulation in that area.")

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90, Reply Comments and Recommendations of the Attorney General of Indiana, May 19, 2003, at p. 9 (emphasis in original).

[Through use of "long-arm statutes"] States similarly have enforced their own donot-call database laws against telemarketers across the country, irrespective of whether the call was "intrastate" or "interstate" in nature. ... Since the enactment of state do-not-call database systems, many states have taken legal action against telemarketers who violate their laws by calling into their states. No such action has been defeated by the argument that a state cannot protect its residents from receiving solicitations they have stated they do not want.

2002 NAAG Comment, at p. 12 (footnotes omitted).

because North Dakota law would frustrate supposed Congressional goals of regulatory uniformity.⁵ The argument is flawed. The paramount goal of the TCPA is consumer protection, not some overweening uniformity of a regulatory scheme. Remarkably FreeEats does not cite a single non-FCC authority on the issue of preemption, instead bootstrapping its argument that the FCC should preempt State law on the FCC's equally unsupported statements that the FCC should preempt State law. The FCC, at least, acknowledges the underlying support for giving preemptive effect to the TCPA is, at best, "ambiguous." TCPA Order at ¶ 82. However, the evidence <u>against</u> preemption is not ambiguous; the plain language of the TCPA controls.

A. The Supremacy Clause of the United States Constitution

"[T]he North Dakota Legislature has plenary powers, except as limited by the State Constitution, the United States Constitution, and Congressional Acts in matters in which the federal government is supreme." State ex rel. Agnew v. Schneider, 253 N.W.2d 184, 187 (N.D. 1977)(citations omitted). "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal government, subject to only limitations imposed by the Supremacy Clause." Tafflin v. Levatt, 493 U.S. 455, 458 (1990). The Supremacy Clause of the U.S. Constitution

FreeEats hints at possible First Amendment problems with § 51-28-02, but never addresses the issue squarely. <u>See e.g.</u> Petition at pp. 2, 12. "In considering the constitutionality of an Act, every reasonable presumption in favor of its constitutionality prevails. ... And the courts will not declare a statute void unless its invalidity is ... beyond a reasonable doubt." <u>Menz v. Coyle</u>, 117 N.W.2d 290, 295 (N.D. 1962)(citations omitted). <u>See also N.D. Const. Art. VI, § 4. Van Bergen v. Minnesota, 59 F.3d 1541, 1549-56 (8th Cir. 1995) provides a comprehensive analysis, and rejection of, free speech arguments against Minn. Stat. § 325E.27, which is virtually identical to NDCC 51-28-02. <u>See generally Mainstream Marketing Services, Inc. v. F.T.C.</u>, 358 F.3d 1228 (10th Cir. 2004)(cert. denied 2004 WL 2050134 (Oct. 4, 2004)).</u>

provides the sole basis for limiting State sovereignty:

This Constitution and Laws of the United States which shall be made in pursuant thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.6

B. There Are Strong Presumptions Against Preemption

Courts - and presumably executive agencies whose decisions are reviewable by courts - will not infer preemption and will always presume Congress did not intend to displace State law unless Congress does so clearly and unmistakably. Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)(a court will not construe a federal statute to "upset the unusual constitutional balance of federal and state powers" unless Congress "[made] its intention to do so unmistakably clear to the language of the statute"). "Because of the generally interstitial nature of Federal law, a preemption of State law by Federal statute or regulation is not favored and, consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace State law." Federal Land Bank v. Lillehaugen, 404 N.W.2d 452, 455 (N.D. 1987)(citing Marilyn v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 2d. 576 (1981)(rejecting preemption of State law by Farm Credit Act of 1971)); Otter Tail Power Co. v. Public

⁶ By its express language the Supremacy Clause recognizes only the "Constitution," "Laws," and "Treaties" of the United States as "the Supreme Law of the Land." The negative implication, therefore, is that these three sources of law - the "Constitution," "Laws," and "Treaties" - establish the exclusive grounds for displacing state law. Clark, B., Separation of Powers as a Safeguard of Federalism, 79 Tex.L.Rev. 1321, 1338 (2001)(citing Nelson, C., Preemption, 86 Va.L.Rev. 225, 234 (2000)). As will be discussed in more detail, infra, the FCC, applying appropriate skepticism, should reject the FreeEats argument, which seeks to promote FCC orders and comments rather than the "Constitution," "Laws," and "Treaties" as its basis for preemption.

Serv. Comm'n, 354 N.W.2d 701, 705 (N.D. 1984)("We are authorized to start with a basic assumption that displacement of state law by a federal preemption was not intended."). The strong presumption against preemption is grounded in concepts of federalism and dual sovereignty. "Such reluctance seems particularly appropriate in light of the Supreme Court's repeated emphasis on the central institutional role of Congress and the congressional political process in protecting the sovereignty of the states." Tribe, L., American Constitutional Law § 6-28 at 1175-76 (3d ed. 2000).

The presumption against preemption is especially important when determining the preemptive effect of administrative regulation, as opposed to the underlying federal statute. As explained by the court in <u>Hillsborough County v. Automated Medical Labs.</u>, Inc., 471 U.S. 707, 717, 105 S.Ct. 2371, 85 L.Ed. 2d 714 (1985):

As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

And, consumer protection laws enjoy an even greater presumption against preemption:

Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption. (See California v. ARC America Corp. (1989) 490 U.S. 93, 101, 109 S.Ct. 1661, 104 L.Ed. 2d 86 [unfair business practices]; Smiley v. Citibank (1995) 11 Cal.4th 138, 148, 44 Cal.Rptr.2d 441, 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed. 2d 25 ...

Black v. Financial Freedom Senior Funding Corp., 92 Cal.App. 4th 917, 112 Cal.Rptr. 2d 445, 452-53 (Cal Ct. App. 2001).

C. Determination of Congressional Intent

"Courts are reluctant to infer pre-emption ... and it is the burden of the party claiming Congress intended to pre-empt state law to prove it." North Dakota v. Liberty Nat'l Bank & Trust, 427 N.W.2d 307, 310 (N.D. 1988)(citing Lillehaugen, 404 N.W.2d at 455; Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 216 Cal. Rptr. 345, 702 P.2d 503 (1985)(appeal dismissed, 475 U.S. 1001, 106 S.Ct. 1170, 89 L.Ed. 2d (1986))). In deciding whether the TCPA preempts NDCC § 51-28-02, the FCC presumably would have to determine it was Congress' intent to do so when enacting the TCPA. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987)("In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress."). "In the final analysis, 'the question whether federal law in fact preempts state law in any given case necessarily remains largely a matter of statutory construction." Liberty Nat'l, 427 N.W.2d. at 310 (citing American Constitutional Law § 6-25 at 480 (2d ed. 1988)).

The principal source for the intent of Congress is the language it used in the TCPA. "Courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose or to hold that the legislature intended anything different from what their language imports. ... And the intention thus derived, it has always been held, is the best guide in the construction of statutes." People v. Wintermute, 46 N.W. 694, 703 (Dak. Terr. 1875)(citation omitted).

The primary objective of statutory construction is to ascertain the Legislature's intent. Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218, 220 (N.D. 1992). In ascertaining legislative intent, we look first at the words used in the statute, giving them their ordinary, plain-language meaning. Shiek v. North Dakota Workers Comp. Bureau, 1998 ND 139, ¶ 16, 582 N.W.2d 639. ... "If the language of a statute is clear and unambiguous, the legislative intent is

presumed clear from the face of the statute." Medcenter One, Inc. v. North Dakota State Bd. of Pharmacy, 1997 ND 54, ¶ 13, 561 N.W.2d 634. If statutory language is ambiguous, we may resort to extrinsic aids to construe the statute. Hassan v. Brooks, 1997 ND 150, ¶ 5, 566 N.W.2d 822. For an ambiguous statute, "[w]here a public interest is affected, an interpretation is preferred which favors the public. A narrow construction should not be permitted to undermine the public policy sought to be served." 2B Norman J. Singer, Sutherland Stat. Constr. § 56.01 (5th ed.1992).

Estate of Thompson, 586 N.W.2d 847, 848-49, 1998 ND 226, ¶ 7 (N.D. 1998)(interpreting federal statute 42 U.S.C. § 1396p(b) relating to medical assistance benefits). See also City of Dickinson v. Thress, 290 N.W. 653 (N.D. 1940)(where language of a statute is plain and unambiguous, a court cannot indulge in speculation as to the probable or possible qualifications which might have been in the minds of the legislators, but the statute must be given effect according to its plain and obvious meaning and cannot be extended beyond it); NDCC § 1-02-02 ("Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears ...").

1. The TCPA does not expressly preempt State law

There is no express statement of general preemption to be found in the TCPA.

Clearly, there is no explicit expression of preemption on the face of the TCPA. In addressing the issue of state law preemption, Congress merely notes that the TCPA does not preempt state laws that impose more restrictive intrastate requirements. Further, Congress articulated that, except with respect to technical and procedural standards, the TCPA would not preempt state law. Congress wrote nothing about the TCPA affirmatively preempting any state law. As the Eighth Circuit Court of Appeals correctly noted, "[i]f Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision." [Van Bergen v. Minnesota, 59 F.3d 1541, 1547 (8th Cir. 1995)] Indeed, under the Supreme Court precedent cited above, Congress not only could, but was required to make clear an intent to preempt in order for preemption to be effectuated. In other words, in the absence of an intent to preclude any state enforcement (absent here), Congress's silence in this regard is not only conspicuous, it is dispositive.

2002 NAAG Comment, at p. 10 (emphasis in original; footnotes omitted). Indeed, when the DNC Implementation Act was passed, the House Report itself declined to assert preemption of State law - "The Committee takes no position on the issue of state preemption in H.R. 395." - hardly a ringing endorsement for FreeEats' argument that Congress clearly intended preemption. DNC Implementation Act at 4.

2. The plain language of the savings clause controls

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505, 98 S.Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690, 93 L.Ed. 2d 613 (1987) (opinion of Marshall, J.).

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed. 2d. 407 (1992). In the TCPA just such a provision can be found at 47 U.S.C. § 227(e), the "savings clause." FreeEats rests much of its preemption argument on its reading of the savings clause, relying on it to limit the power of States to regulate interstate telecommunications. This, however, is a fundamental misreading of the statute by FreeEats.

The TCPA savings clause, by its plain language, <u>broadens</u> the jurisdiction of the States by allowing the complete prohibition of ADADs. Under the savings clause of § 227(e) certain State rights are reserved, or "saved." States may pursue two courses of action without running afoul of federal preemption: States may impose more restrictive

intrastate requirements or regulations on certain practices or the States may prohibit those practices outright.⁷

To understand the effect of the savings clause, the first place to look is the language of the savings clause itself. The TCPA savings clause is found at 47 U.S.C. § 227(e)(1):

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

Legislative power to prohibit certain conduct necessarily includes the ability to exercise a lesser power to achieve less-drastic measures. See e.g. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46, 106 S.Ct. 2968, 92 L.Ed. 2d 266 (1986)("the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 411, 109 S.Ct. 2994 (1989)("The Tribe's power to exclude nonmembers from its reservation—which derived from its aboriginal sovereignty and the express provisions of its treaty with the United States—necessarily includes the lesser power to regulate land use in the interest of protecting the tribal community."); Commonwealth v. Wilsbach Distrib., Inc., 519 A.2d 397, 400 (Pa. 1986)(commenting on State regulation of liquor, "The power of prohibition includes the lesser power of regulation and a state may adopt such measures as are reasonably appropriate or needful to render the exercise of that power effective.").

The exceptions contained in the first paragraph of 47 U.S.C. § 227(1) do not apply here. Section 227(d) prescribes minimal technical and procedural standards for facsimile machines and prerecorded voice systems. Paragraph (2) of 47 U.S.C. § 227(e) prohibits "Do Not Call" states from failing to include State residents from the national "do not call" database into their own database.

"Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. ..." NDCC § 1-02-03. If, as an aid to understanding, one parses out the language of the clauses at issue and presents it as follows, the intent is even more clear:

... nothing in this section or in the regulations prescribed under this section shall preempt any State law

that imposes more restrictive intrastate requirements or regulations on

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

, or which

prohibits-

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

The term "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. Narum v. Faxx Foods, Inc., 590 N.W.2d 454, 1999 ND 45, ¶ 19 (citing State v. Eldred, 1997 ND 112, ¶ 21, 564 N.W.2d 283; State v. Silseth, 399 N.W.2d 868, 870 (N.D.1987)). Here, the second "or" followed by a comma in "imposes more restrictive intrastate requirements or regulations on, or which prohibits" signals the two options are distinct. "A generally accepted rule in aid of the construction of statutes is that a limiting phrase or clause is to be restrained to the last antecedent unless the subject matter or context indicates a different legislative intent." Kohler v. Stevens, 74 N.D. 655, 24 N.W.2d 64, 72 (1946)(citations omitted). The clause "imposes more restrictive intrastate requirements or regulations on" is separate and distinct from "or

which prohibits" such that while "more restrictive ... requirements or regulations" must be "intrastate," no such "intrastate" restriction applies to a law "which prohibits" altogether. In other words, "intrastate" modifies "more restrictive" but does not modify "which prohibits." See also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, CC Docket No. 92-90, Reply Comments and Recommendations of the Attorney General of Indiana, May 19, 2003, at pp. 17-18.

The FCC is well aware that courts have ruled against TCPA preemption on these very grounds: "See, e.g., Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995)(concluding that the 'savings clause' of section 227(e)(1) does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted); see also Kaufman v. ACS Systems, Inc., No. BC222588 (Los Angeles Superior Ct. Dec. 12, 2001)." 17 FCC Rcd at 17487, n. 174. See also Order, dated June 4, 2004, Florida v. Sports Authority Florida, Inc., U.S. Dist. Ct., Middle Dist. Fla., Case No. 6:04-CV-115-Orl-JGG, at p. 6; see generally, Order, dated March 8, 2004, North Carolina v. Debt Management Foundation Services, Inc., U.S. Dist. Ct., E. Dist. N.C., W. Div., Case No. 5:03-CV-950-FL(3).

3. Even if the savings clause is ambiguous, there is no preemption of NDCC § 51-28-02

Even if the savings clause is ambiguous with respect to preemption - as FreeEats infers by abandoning the text of the TCPA and instead resorting to legislative history, FCC missives and almost everything except the plain language of the statute - the presumptions against preemption trump any opposing position. The FCC itself says

the interstate/intrastate issue in the TCPA is ambiguous. With respect to the TCPA, the FCC said:

82. Second, pursuant to section 227(e)(1), we recognize that states may adopt more restrictive do-not-call laws governing intrastate telemarketing. With limited exceptions, the TCPA specifically prohibits the preemption of any state law that imposes more restrictive intrastate requirements or regulations. Section 227(e)(1) further limits the Commission's ability to preempt any state law that prohibits certain telemarketing activities, including the making of telephone solicitations. This provision is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted. As set forth below, however, we caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules.

TCPA Order at ¶ 82 (emphasis added)(footnotes omitted). FreeEats cannot escape the FCC's admission that the TCPA is silent on the issue of preemption of State regulations of interstate calls, and, in the eyes of the FCC, ambiguous at best. Where there is ambiguity, the presumption against preemption means FreeEats' Petition should be denied.

FreeEats ignores Congressional intent and any statutory construction of the TCPA but instead immediately looks outside the statute and to various rule-making pronouncements by the FCC itself, e.g. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Dkt. No. 92-90, Report and Order, 7

FCC Rcd 8752 (1992); TCPA Order, supra.9

Having abandoned any argument for preemption based on construction of Congress' language in the TCPA, FreeEats asks the FCC to infer preemption from these other sources. The legislative findings and history of the TCPA simply do not bolster FreeEats' position. Under the Federal Communications Act of 1934, States had jurisdiction over intrastate calls, while the FCC traditionally had jurisdiction over most aspects of interstate calls. 47 U.S.C. §§ 151, 152(b). In 1991 Congress enacted the TCPA, in part to allow State regulation over certain interstate calls. The Congressional findings accompanying the TCPA support North Dakota's reading of the savings clause.

The findings state, in part:

Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

Pub.L.102-243, § 2 (Congressional Statement of Findings at ¶ 7). The effect of the finding is self-evident: States needed jurisdiction over interstate calls in order to stop

The Supreme Court has distinguished between an agency's interpretation of a preemption provision and an agency's interpretation of a substantive provision of a statute the agency administers. In Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996), the Court addressed whether the judiciary should defer to an OCC regulation defining "interest" as used in the National Bank Act to include late fees. This construction resulted in the preemption of state laws providing that certain late fees are unconscionable. Although the Court decided to defer to OCC's interpretation, the Court explicitly declined to accord such deference to an agency regulation purporting to preempt state law directly. The Court cautioned against preemption analysis that "confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided de novo by the courts." Smiley, 517 U.S. at 744. Here, FreeEats asks the FCC to infer preemption based upon a jurisdictional provision of the TCPA, i.e., its savings clause. FreeEats makes no argument that the substantive provisions of the TCPA should lead to a decision that North Dakota law is preempted.

telemarketers from evading their laws; the TCPA, and particularly the savings clause, provides the needed jurisdiction. Congress enacted the TCPA to protect privacy interests of residential telephone subscribers. S. Rep. No. 102-178 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970. Congress specifically emphasized its concern over automated telephone calls and the use of automatic dialers.

The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automated dialers.

- <u>Id</u>. Consistent with the purpose and language of the statute, the Congressional findings focus on problems associated with automated dialing systems.
 - (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Pub. L. 102-243, § 2 (Congressional Statement of Findings at ¶¶ 10, 12). The statutory purpose and related findings underscore Congressional intent to limit all calls using automated dialing systems, "regardless of the content or the initiator of the message."

Id. at ¶ 12. Consistent with the purpose of the TCPA and the findings supporting the statute, Congress broadened State enforcement to allow for prohibition of calls using ADADs.

4. The Eighth Circuit Court of Appeals, in <u>Van Bergen</u>, ruled the TCPA does not preempt State law governing ADADs

In <u>Van Bergen v. Minnesota</u>, 59 F.3d 1541 (8th Cir. 1995) the Eighth Circuit Court of Appeals addressed the TCPA preemption issue with respect to the Minnesota statute regulating ADAD calls to consumers. ¹⁰ In <u>Van Bergen</u>, a gubernatorial candidate in Minnesota brought an action against the State Attorney General, arguing the TCPA preempted Minnesota's statute prohibiting the use of automatic dialing-announcing devices. The candidate used an ADAD system to call potential voters. <u>Id.</u> at 1546.

The congressional findings appended to the TCPA state that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices. 47 U.S.C. § 227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplant state law but to provide interstitial law preventing evasion of state law by calling across state lines."

<u>Van Bergen</u>, 59 F.3d at 1548. Contrary to FreeEats' argument, Congress enacted the TCPA to broaden State authority, not supplant State law.

The Minnesota statute, Minn. Stat. § 325E.27 ("Minnesota Statute"), is <u>virtually</u> identical to NDCC § 51-28-02. Van Bergen, 59 F.3d at 1545 n. 2:

³²⁵E.27. Use of prerecorded or synthesized voice messages
A caller shall not use or connect to a telephone line an automatic dialingannouncing device unless: (1) the subscriber has knowingly or voluntarily
requested, consented to, permitted, or authorized receipt of the message; or (2)
the message is immediately preceded by a live operator who obtains the
subscriber's consent before the message is delivered. This section and section
325E.30 do not apply to (1) messages from school districts to students, parents,
or employees, (2) messages to subscribers with whom the caller has a current
business or personal relationship, or (3) messages advising employees of work
schedules.

D. The TCPA Does Not Result In Field Preemption

Congress did not intended to occupy the entire field of interstate ADAD issues by enacting the TCPA. Field preemption exists, only "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Gade v. National Waste Mgmt. Sys., 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed. 2d. 73 (1972)(quoting Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153, 102 S.CT. 3014, 3022, 77 L.Ed. 2d. 664 (1982)).

However, the field preemption question relating to the TCPA has already been answered in the negative by the Eighth Circuit Court of Appeals. Under facts similar to the instant case, <u>Van Bergen</u> decisively rejected any notion of field preemption. In reaching its decision that the Minnesota Statute prohibiting ADAD calls was not preempted, the court emphatically dismissed the field preemption argument.

The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws. If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision. Further, the preemption provision makes it clear that Congress did not intend to "occupy the field" of ADAD regulation, see Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248 (1963), or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation.

ld. at 1548 (emphasis added).

The Supreme Court of the United States has emphasized that federal occupation of a field is not easily inferred:

The principle to be derived from [the Supreme Court's] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

<u>Florida Lime & Avocado Growers v. Paul</u>, 373 U.S. 132, 142 (1963). Indeed, the Supreme Court rarely finds the requisite persuasive reasons and is increasingly hesitant to imply

field preemption in federal statutes. <u>See Camps Newfound/Owatonna, Inc. v. Town of Harrison</u>, 520 U.S. 564, 617 (1997)(Thomas, J., dissenting)("our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it"); <u>see also Hillsborough County v. Automated Med. Lab.</u>, 471 U.S. 707, 717 (1985)(reiterating the Court's reluctance to infer preemption from the comprehensiveness of statutes); <u>Department of Soc. Servs. v. Dublino</u>, 413 U.S. 405, 415 (1973)(explaining that federal legislation in complex fields is likely to be detailed regardless of whether Congress intended to preempt supplementary State legislation).

That the entire field is not occupied by federal law is apparent from other sections of the TCPA, apart from the savings clause at § 227(e). For example, § 227(b)(3) of the TCPA, entitled "Private right of action," explicitly states that "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State — ..." an action for violation of the TCPA seeking an injunction and or damages. 47 U.S.C. § 227(b)(3). Section 227(c)(3)(J) says:

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall— ... be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law; ...

(emphasis added).

Section 227(e)(2) acknowledges that States may regulate telephone solicitations by stating, "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State." Section 227(f) gives State Attorneys General the ability to enforce the TCPA and, under § 227(f)(5) saves their

investigatory powers under State law." (emphasis added). Also, TCPA § 227(f)(6) contains the following:

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

47 U.S.C. § 227(f)(6). In <u>Billey v. North Dakota Stockmen's Ass'n</u>, 579 N.W.2d 171, 178 (N.D. 1998) the North Dakota Supreme Court interpreted a similar provision in the Packers and Stockyards Act of 1921, 7 U.S.C. § 228c, which said, "That this section shall not preclude a State from enforcing State law or regulation with respect to any packer not subject to this chapter or section 204 of this title." The North Dakota Supreme Court held, "This provision would be mere surplusage if Congress intended the Act to wholly occupy the field and preempt <u>all</u> state regulation of subjects covered by the Act. The inclusion of a specific, limited preemption provision is a clear expression of Congressional intent the Act was not meant to wholly preempt state law in this field." <u>Billey</u>, 579 N.W.2d at 178 (emphasis in original). Absent all the rest, the mere existence of § 227(f)(6) is persuasive evidence against field preemption.

Other commentators have made persuasive arguments against TCPA field preemption:

In addition, other language of the TCPA confirms that the Act does not preempt state DNC laws and demonstrates that Congress did not intend to occupy the field of telephone solicitation regulation to the exclusion of the states. For example, the TCPA states that if the FCC establishes a "single national database of telephone numbers of subscribers who object to receiving telephone solicitations," then a state with a law regulating telephone solicitations must import the part of the national database relating to the state into that state's privacy list. 47 U S.C. § 227(e)(2)(emphasis added). Furthermore, the TCPA specifically states that any FCC database "shall ... be designed to enable States to use the [Commission's database] . . . for purposes of administering or

enforcing State law." 47 U.S.C. § 227(c)(3)(J)(emphasis added). This language clearly indicates that state DNC laws would continue to be enforced unabated even as to interstate calls-and that Congress did not intend to occupy the field of telephone solicitation regulation.

Finally, the Do-Not-Call Implementation Act, PL 108-10 (HR 395 ("DNCIA") confirms both that the TCPA does not preempt state DNC laws and that the FCC is not empowered to preempt those laws. The DNCIA specifically requires the FCC, once it promulgates its own DNC rule, to provide Congress with "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States." If the TCPA preempted state DNC laws, or if Congress believed that the FCC had the authority to preempt those laws, there would be no reason for Congress to have enacted a law requiring an analysis of state registry enforcement after the FCC's own rule was in force.

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Opposition to Petition for Reconsideration, Steve Carter, Attorney General of Indiana, October 8, 2003, at p. 4 (emphasis in original).

Congress's choice of language is very telling and provides evidence of Congress's lack of intent to preempt state law, either explicitly, implicitly, or through occupation of the field. Congress wrote that a state may not, "in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State." This language is telling for several reasons. First, implicit in this language is that states would, in fact, have their own telephone solicitation regulations. Second, the only limitation Congress places is that the states' databases must include those numbers from any federal database relative to that state. And there is no reference anywhere in the statute to limiting a state's enforcement powers.

Moreover, the TCPA specifically states that any FCC national do-not-call database "shall be designed to enable States to use the [Commission's database] . . . for purposes of administering or enforcing State law." That directive would have made no sense if Congress intended to give a national do-not-call registry preemptive effect. Congress did not express an intention to preempt states on telephone solicitations, nor did Congress intend to occupy the field.

2002 NAAG Comment, at pp. 10-11 (emphasis in original; footnotes omitted).

E. The TCPA Does Not Result in Conflict Preemption

The Legislature is presumed to know the law when enacting legislation. Comstock Const., Inc. v. Sheyenne Disposal, Inc., 2002 ND 141 (N.D. 2002). The TCPA and the Supremacy Clause existed for years before § 51-28-02 and the North Dakota Legislature must be presumed to have considered their effect on its own legislation. And while the result of § 51-28-02 may be non-identical standards for telemarketers under the State versus the federal law, such a result is not prohibited absent genuine "conflict preemption."

Conflict preemption requires the Supreme Court be "convinced that there is an 'actual conflict' for pre-emption purposes" between federal law and the challenged State law. State v. Liberty Nat'l Bank & Trust, 427 N.W.2d 307, 314 (N.D. 1988)(reversing improper dismissal on grounds of conflict preemption); see also Northwestern Fed. S. & L. v. Ternes, 315 N.W.2d 296, 301-02 (N.D. 1982)(to have preemption it is essential that State law exist in opposition or contrary to federal law); English v. General Elec. Co., 496 U.S. 72, 90 (1990).

Conflict pre-emption occurs where compliance with both federal and state laws is a physical impossibility, Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed. 2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See also Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed. 2d 580 (1984); Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 103 S.Ct. 2476, 76 L.Ed. 2d 678 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed. 2d 179 (1978).

<u>Liberty Nat'l</u>, 427 N.W.2d at 309-10.

A state law is not invalid under the Supremacy Clause merely because it differs from a federal law. See generally CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, ---, 107 S.Ct. 1637, 1645-1648, 95 L.Ed. 2d 67 (1987); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed. 2d 248

(1963); Pinney Dock and Transport Co. v. Penn. Cent. Corp., 838 F.2d 1445, 1480-1482 (6th Cir.1988); Rousseff v. Dean Witter & Co., Inc., 453 F.Supp. 774, 780-782 (N.D.Ind.1978); L. Tribe, American Constitutional Law § 6-26, at p. 491 (2d ed. 1988); but compare Transamerica Ins. Co. v. Standard Oil Co., 325 N.W.2d 210, 213 (N.D.1982). Rather, the inquiry is whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

ld.

"Thus, if it is possible to comply with both federal and state law, there is neither a conflict nor a frustrated purpose. See generally Rotunda, R. & Nowak, J., Treatise on Constitutional Law: Substance and Procedure, § 12 (2d ed. 1992 & Supp. 1993)." Bravman v. Baxter Healthcare Corp., 842 F.Supp. 747, 753 (S.D. N.Y. 1994); see also Ginochio v. Surgikos, Inc., 864 F.Supp. 948, 951 (same). Here, it is possible for FreeEats to comply with both laws simply by following the North Dakota law. Doing so will not be in violation of any provision of the TCPA identified by FreeEats.

In a recent Pennsylvania case, the court addressed the interplay between State and federal copyright laws alleged to conflict with one another:

In the instant case, § 4119 does not create a situation where it is impossible to comply with both federal and state law. Trademark infringement is both a state crime and a federal crime. It is certainly possible to comply with both laws simply by avoiding trademark infringement. Next, Appellant has not articulated how the existence of state criminal penalties for trademark infringement stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Rather, state criminal penalties simply "complement[] and supplement []" federal criminal penalties for trademark infringement. See, Mead Data Central, 702 F.Supp. at 1041. No conflict preemption exists; therefore, Appellant's final claim fails.

Commonwealth v. Sow, 2004 WL 2166148, ¶16 (Pa. Super. September 28, 2004)(footnote omitted).

"When two or more conflicting statutes or rules relate to the same subject matter in general, every effort should be made to give meaningful effect to each without

rendering one or the other useless." Keyes v. Amundson, 343 N.W.2d 78, 83 (N.D. 1983)(citations omitted). "Statutes and rules are to be construed in a way which does not render them useless, and because the law neither does nor requires idle acts we will not assume that any statute or rule was intended to be useless rhetoric." Id. (citations omitted). The plain language here provides for State law enforcement against any calls -- interstate or intrastate -- that use automated calling devices. The savings clause states that at least two types of State law will not be preempted. First, State laws imposing more restrictive intrastate requirements are not preempted. Second, State laws prohibiting any calls in the four enumerated areas -- fax machines, automatic dialing devices, prerecorded messages, and telephone solicitation -- are not preempted.

Indeed, where the State and federal law both have the same objective, as they do in the instant case — to protect consumers from uninvited and bothersome prerecorded messages — the laws compliment one another. In <u>Liberty Nat'l</u>, <u>supra</u>, the North Dakota Supreme Court addressed the interplay of State and federal laws relating to national banks, specifically those relating to property ownership by banks.

As we have noted, the primary purpose of each law is the same, <u>i.e.</u>, preventing banks and corporations from becoming monopolistic holders of real estate. So too, there is a similar congruity of the secondary goals, <u>i.e.</u>, providing a measure of protection to banks and corporations through the respective legislative bodies' reasonable choices of appropriate divestiture periods. Thus, the state law is not repugnant to the purposes and objectives of the federal law. By incorporating the federal proscription against banks holding real estate "in mortmain," state law, in fact, enhances the primary purpose of the federal statute. <u>See Rousseff v. Dean Witter & Co., Inc., supra, 453 F.Supp. at 781; cf. CTS Corp. v. Dynamics Corp. of America, supra.</u> "[W]here ... the state law enhances the primary and overall purpose of the federal law, it is not invalid under the Supremacy Clause." <u>Rousseff v. Dean Witter & Co., Inc., supra, 453 F.Supp.</u> at 782.

Liberty Nat'l, 427 N.W.2d at 314-15. Section 51-28-02 and the TCPA likewise

compliment one another insofar as both have the same objectives of protecting telephone subscribers from unwanted and burdensome telemarketing practices.

The Eighth Circuit Court of Appeals has directly addressed, and rejected, conflict preemption with respect to the TCPA and a law virtually identical with § 51-28-02. "It is clear that the Minnesota statute and the TCPA are designed to promote an identical objective, and that there is nothing in the two statutes that creates a situation in which an individual cannot comply with one statute without violating the other." <u>Van Bergen</u>, 59 F.3d at 1548. And, of course, the North Dakota statute is virtually identical to the Minnesota Statute; the same result should obtain.

CONCLUSION

North Dakota should not be required to defend its statute before the FCC at the instance of FreeEats; sovereign immunity bars this proceeding, particularly since decision on the merits of this matter is currently pending before a court of competent jurisdiction. Notwithstanding the same, there is no evidence Congress intended the TCPA to preempt State law and FreeEats has failed to meet its burden.

Dated this 8th day of November, 2004.

STATE OF NORTH DAKOTA Wayne Stenehjem Attorney General

By:

Todd A. Sattler, NDBN 5718
James Patrick Thomas, NDBN 6014
Assistant Attorneys General
Consumer Protection
& Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
Telephone (701) 328-5570
Facsimile (701) 328-5568

Attorneys for State of North Dakota

G:\CPAT\NoDak\ccAd\FCC Comment ND.doc